[J-66-2012][M.O. – Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CITY OF PHILADELPHIA, TRUSTEE UNDER THE WILL OF STEPHEN GIRARD, DECEASED, ACTING BY THE BOARD OF DIRECTORS OF CITY TRUSTS,	:	No. 102 MAP 2011
	:	Appeal from the Order of the Commonwealth Court dated 4/4/11 at No. 1725 CD 2010 which reversed the Court of Common Pleas, Cumberland County, Civil Division, order dated 7/28/10 at No. 07-6943 civil term
Appellant	:	
v.	:	
CUMBERLAND COUNTY BOARD OF ASSESSMENT APPEALS,	:	
Appellee	:	ARGUED: May 9, 2012

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 30, 2013**

The majority opinion is noteworthy in terms of its scope, thoroughness, and thoughtfulness concerning the creation, history, and sui generis character, of the Girard Trust. I find it persuasive, as well, to the degree it sets forth the basis for considering the Trust to be a Commonwealth entity, and I ultimately agree that the Commonwealth Court's order should be reversed under the circumstances.

Nevertheless, I cannot join the opinion in full, as I see no reason to depart from this Court's precedent concerning the scope of tax immunity that a Commonwealth body enjoys. Although, as the majority recognizes, the Trust was created before much of our

tax-immunity and tax-exemption case law was developed, it does not follow – to my mind at least – that this circumstance provides the Trust with a blanket protection from any kind of tax-immunity analysis or any type of limitation on the scope of its immunity based on the principles that have emerged from this Court's cases.

In Leigh-Northampton Airport Authority v. Lehigh County Board of Assessment Appeals, 585 Pa. 657, 889 A.2d 1168 (2005), the Court observed that, although a public entity may be immune from local taxation, the scope of that immunity is limited where the entity leases some of its property "to unrelated organizations or otherwise . . . acquire[s] or use[s] it for some purpose not related to the operation of the [owner's] facility." Id. at 673, 889 A.2d at 1178. In discussing SEPTA v. Board of Revision of Taxes, 574 Pa. 707, 833 A.2d 710 (2003), and Delaware County Solid Waste Authority v. Berks County Board of Assessment Appeals, 534 Pa. 81, 626 A.2d 528 (1993), moreover, the Leigh-Northampton Airport Authority Court likewise explained that "immunity is assumed unless the agency acts outside of its authorized governmental purposes." Lehigh-Northampton Airport Auth., 585 Pa. at 675, 889 A.2d at 1179 (emphasis added). As a matter of sound logic, this restriction – the emphasized language in the above-quoted sentence – should apply to any Commonwealth entity (including the Trust) regardless of when that entity came into being.

SEPTA is even closer to this case because it involved a Commonwealth body, the Southeastern Pennsylvania Transportation Authority, that leased part of its office space to tenants whose activities were unrelated to the performance of SEPTA's purposes. The Court determined that such leased space was taxable, reasoning that the property "is being used for something other than as part of SEPTA's operation. Very simply, SEPTA is acting as a commercial landlord, which is clearly distinct from acting as a metropolitan transportation authority[.]" SEPTA, 574 Pa. at 719, 833 A.2d at

717 (internal quotation marks omitted). Presently, the Girard Trust is also acting as a commercial landlord insofar as the subject property in Cumberland County is concerned. Although the tenant, unlike in SEPTA, is public and not commercial in nature, the public-versus-private character of the tenant is immaterial to the immunity issue since that question hinges on whether the agency, in thus renting out the property, is acting within or outside of its own authorized purposes. Accord Lehigh-Northampton Airport Auth., 585 Pa. at 675, 889 A.2d at 1179.

Here, the tenant's activities are entirely unrelated to the Girard Trust or Girard College. As such, the Trust is using the property solely to raise revenue. It follows that, pursuant to the principles set forth in this Court's precedent, the property is excluded from the scope of the Trust's immunity. Indeed, to hold otherwise, as the majority does, gives the Trust and its tenants an unfair competitive advantage, as the Trust may, in the future, lease the property to commercial enterprises at below-market rates due to its avoidance of real estate taxes. Although the Trust may have been established for beneficial public purposes, Pennsylvania's tax laws were never intended to supply it or its commercial tenants with such a windfall at the expense of county taxpayers.

With that said, I nonetheless agree that the property should not be subject to taxation under the present circumstances because it is being used for a public purpose. In particular, I would find that it is exempt, rather than immune, from taxation, see Lehigh-Northampton Airport Auth., 585 Pa. at 676 n.9, 889 A.2d at 1180 n.9 (noting that immunity is a threshold issue, and a non-immune parcel may be tax-exempt on a separate basis), so long as the public use continues. See PA. CONST. art. VIII, §2(a)(iii) (permitting the General Assembly to exempt from taxation "[t]hat portion of public property which is actually and regularly used for public purposes"); 53 Pa.C.S. §8812(a)(8) ("The following property shall be exempt from all county, city, borough,

town, township, road, poor, county institution district and school real estate taxes: . . . [a]ll other public property used for public purposes . . .."); [1] see also Appeal of Mun. Auth. of Borough of West View, 381 Pa. 416, 420, 113 A.2d 307, 309 (1955) (recognizing that leased property is exempt from taxation where the lessee uses it for a public purpose). See generally Wesleyville Borough v. Erie Cnty. Bd. of Assessment Appeals, 676 A.2d 298, 302 (Pa. Cmwlth. 1996) ("The controlling test for tax exemption is not whether the property . . . has been leased out, but whether the use of the property so leased is for a public purpose."). [2] This makes a practical difference in that, under an exemption framework, the property could become taxable in the future if it is leased for a non-public use. Such a result, in my opinion, would comport with both controlling law and fundamental fairness.

Mr. Justice Baer joins this concurring opinion.

[1] Section 8812(a)(8) represents the 2010 recodification, in the new Consolidated County Assessment Law, of a substantively similar provision in the now-repealed Fourth to Eighth Class County Assessment Law of 1943. See 72 P.S. §5453.202(a)(7) (repealed).

[2] The Commonwealth Court expressed that the property is not being put to a public use regardless of the identity of the lessee because it is being used "solely as an investment property that generates rental income." City of Phila. v. Cumberland Cnty. Bd. of Assessment Appeals, 18 A.3d 421, 429 n.15 (Pa. Cmwlth. 2011). This position is substantially inconsistent with the cases cited above as well the discussion in Appeal of Allegheny County, 425 Pa. 578, 581, 229 A.2d 890, 891 (1967).